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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. .....

INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA,
Petitioner

vs.

JAMES D. HODGSON, SECRETARY OF LABOR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on March 9, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ..... F.2d ..... and is reproduced as Appendix A hereto. The opinion of the District Court is reproduced as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 482(b), requiring in terms that the Secretary of Labor initiate suit within 60 days of receipt of a complaint con-

cerning a union election from a union member upon the Secretary's finding that there is probable cause to believe that a violation of such member's statutory rights has occurred is a jurisdictional provision.

STATUTE INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 482 provides as follows:

> (a) A member of a labor organization—
> (1) *who has exhausted the remedies available under the constitution and bylaws of such organization* and of any parent body, or
> (2) who has invoked such available remedies without obtaining a final decision *within three calendar months* after their invocation,
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of Section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.
>
> (b) The Secretary *shall investigate* such complaint and, if he finds *probable cause* to believe that a violation of this subchapter has occurred and has not been remedied, *he shall*, within sixty days *after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any*, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The Court shall have power to take such action as it deems proper to preserve the assets of the labor organization. (emphasis supplied)

STATEMENT OF THE CASE

This action arises out of an International Union election conducted by Petitioner's members in February, 1968. On October 29, 1968, suit was brought by the Secretary after having received three complaints from three individual members respecting the conduct of elections in three local subordinate unions affiliated with Petitioner (App. 7, 8). Petitioner is composed of more than 750 subordinate local unions (App. 12). The Secretary of Labor's law suit was brought 135, 132 and 126 days respectively from the dates the three complaining members of Petitioner protested to the Secretary the manner in which the contested election was conducted in their particular local unions. The Secretary had previously obtained a waiver of the statutory time limit in which to bring suit from Petitioner (App. 5, 6). The case was pending before the District Court on various motions and briefs when the District Court *sua sponte* filed a Memorandum Opinion and Order on December 3, 1969, concluding that the jurisdiction of the District Court had been improperly invoked by the Secretary since the suit was brought well beyond the 60-day statutory limit (App. 17).

In such Memorandum Opinion and Order the Secretary was accorded a period of time to show cause why the action should not stand dismissed (App. 32). The Secretary's response was an affidavit from an official of the Department of Labor stating in essence that it had been the practice of the Department to obtain waiver agreements and that the proposed action of the District Court would impair the operations of the Department of Labor in this respect.

The District Court afforded the parties an oral argument, following which, on May 6, 1970, the District Court filed a further Memorandum Opinion and Order, concluding that: "The Secretary does not question the Court's conclusions that (a) where the time in which an action may be brought is established by the statute giving the right of action, the commencement of such action within such time of limitation is a condition precedent to bringing the action; (b)

that a court's lack of jurisdiction of the subject matter of an action cannot be waived by the consent or other action of the parties litigant; (c) that, where there is want of jurisdiction of the subject matter of litigation, a court should decline *sua sponte* to proceed . . . and (d) that a court must dismiss an action whenever it appears that it lacks jurisdiction of the subject matter of the litigation" (App. 38, 39; App. B, page ....).

Upon appeal, the Court of Appeals noted that this "was a case of first impression at the appellate court level concerning the appropriate interpretation of Section 402(b) of the Act, 29 U.S.C. § 482(b)."

After assessing in detail the arguments of Petitioner and Respondent (App. A, page ....), the Court of Appeals noted that it had "stated the arguments of appellee and appellant in detail *because we believe them to be in close balance and difficult to weigh.*" The Court then stated: "Our final analysis of the problem is that appellee union's voluntary waivers which were relied upon by appellant may be pled by appellant Secretary of Labor as an equitable defense to estop *the otherwise mandatory bar of the statute.* The reasoning by which we reach this result *takes a little longer to state.*" (emphasis supplied)

The Court below acknowledged the vitality of the principle that "where the liability and the remedy are created by the same statute . . . the limitations of the remedy are to be treated as limitations of the right" (App. A, page ....), adding that: "If this represented the final treatment of this issue in a situation where, as here, the statute did create the action and also stated a time limitation, we would have nothing more to do than affirm the carefully reasoned opinions of the District Judge who dismissed this complaint."

The Court below, however, construed the two holdings by this Court, i.e., *Burnett* v. *New York Central R. R. Co.*, 380 U.S. 424 (1965) and *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959) as permitting under the statute there involved a tolling of the period of limitations "by an appro-

priate equitable defense *when that defense accorded with the legislative purpose involved"* (App. A, page ....). The Court then proceeded to what it termed "the difficult problem of seeking to ascertain legislative intent in the context of the facts of this case in Congress' enactment of the 'within 60-day' time limitation." Upon such review the Court reached two conclusions:

1. "That obviously Congress was concerned that the Secretary of Labor move promptly to investigate election complaints and where probable cause was found, to file legal action in the Federal courts;

2. "That the record is completely devoid of any indication that Congress even considered when, if at all, the 60-day limitation would be subject to being tolled by equitable defenses."

Addressing itself to the general legislative purpose the Court below ultimately concluded that: "The congressional intent and purpose in enactment of Title IV (would be) best served by holding that the waiver of the 60-day time limit and the reliance thereon tolled the time limitation and acted to estop its assertion by appellee." Accordingly the Court reversed and remanded this cause for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE WRIT

1. The Court below has decided a significant question of Federal law which has not been, but should be, settled by this Court.

It is important to the general labor movement and to the government that this Court decide the issue of whether or not the "within 60 days" limitation means what it says and whether or not the holding below represents a valid interpretation of this time limitation in the light of the mandatory language employed by the Congress and the legislative history which preceded the enactment by Congress of the 60-day time limit. For if, as the Department of Labor suggested to the Court below, its long-standing practice of accepting waivers of the 60-day time limit was

seriously impaired by the District Court's holding, then the validity of such practice would continue to be doubtful pending a final resolution of the question here presented by this Court. Both the District Court and the Court of Appeals note that a number of District Courts had *assumed* federal jurisdiction in waiver cases. But the only District Court decision where this issue was raised, considered and decided (other than the District Court decision herein) resulted in a contrary decision. *Shultz* v. *Local 851, International Machinists and Aerospace Workers*, ... F. Supp. ..... (No. 70 C 1579, Oct. 29, 1970). Such case is now pending in the Court of Appeals for the Seventh Circuit. There thus remains uncertainty respecting the rights of the government and the labor movement in the light of what we suggest is a mandatory 60-day time limit.

2. Moreover, it would appear that the decision of the Court of Appeals herein is at variance with *Wirtz* v. *Penninsula Shipbuilders Ass'n.*, 382 F.2d 237. In *Penninsula* the sixtieth day available to the Secretary fell on a Sunday. The Secretary's law suit was filed on the sixty-first day—a Monday. The Court held such filing timely in deference to Rule 6A of the Federal Rules of Civil Procedure. But the clear implication of *Penninsula* is that absent Rule 6 the Secretary's action would have been viewed as untimely filed.

3. The decision below ignores the literal language of Section 402(b) which itself persuades that Congress purposefully imposed a 60-day limitation on the newly conferred substantive statutory right of the Secretary to judicially attack the validity of union elections upon receipt of a timely complaint with respect thereto from a union member who had previously exhausted available internal remedies. Thus the statute employs the mandatory term "shall" within 60 days.

The considered choice by Congress of the foregoing mandatory term evinces a plain intent to limit the Secretary to the statutory 60-day period.

The reasons for such a mandatory time limit are obvious. For as the Court below noted, Congress was concerned with speedily settling uncertainties concerning the election of

union officers whose status was put in doubt by a Department of Labor investigation. Congress knew that union leaders whose status was contested could not effectively or efficiently deal with third parties such as employers and that, indeed, employers could easily convert such circumstances into collective bargaining delays, contrary to the interest of the members of the labor organization as well as the public interest in avoiding and minimizing situations leading to labor disputes.

In *Miami Newspaper Printing Pressmen Union Local 46* v. *McCulloch,* 322 F.2d 993, the Court held (CA DC) that: "The requirement that it shall certify the result is mandatory" and proceeded to direct the Labor Board to certify the results of an election previously conducted by it.

Thus the use by Congress of mandatory rather than permissive language demonstrates that the conclusion reached by the Court below is erroneous. In fact, "The language employed by Congress considered in conjunction with the purpose of the Act . . . is so clear as to leave little, if any, room for construction." *Inland Steel Co.* v. *N.L.R.B.,* 170 F.2d 247, 251.

Moreover, the Court below erroneously assessed the legislative history of the 60-day time limit. Initially, S-3974 reported by the Senate Labor Committee, provided that the action of the Secretary shall be brought within 30 days after the complaint is filed *"or as soon thereafter as possible."* It was pointed out in the debates upon the measure that the phrase "as soon thereafter as possible" was added because otherwise, after the expiration of the 30-day period, no remedy would be provided for a violation.[1] Ultimately the Congress doubled the length of time from 30 to 60 days and the measure as finally adopted eliminated the phrase "as soon thereafter as possible." The Senate version of the bill gave the right of action to the Secretary of Labor upon a proper and timely complaint from a union member. If the member was denied relief by the union or could obtain no definitive decision from the

[1] Legislative History of the LMRDA of 1959, at 697.

union within three calendar months, he could then complain to the Secretary. "Since *time is of the essence,* no complaint may be entertained which is filed more than one month after the union denied a remedy or the 3-month period has expired." U.S. Code Congressional and Administrative News, 2337-2338, Legislative History, Senate Report, Labor-Management Act of 1959, 86th Congress, First Session, 1959.

The legislative history discloses, with respect to the problem here presented, that "the Secretary is given 60 days after a complaint of a violation is filed with him *within which to bring an action,* if, after investigation, he finds probable cause to believe Title IV has been violated." Legislative History of the Labor-Management Reporting and Disclosure Act, U.S. Department of Labor publication, at page 698.

The Opinion of the District Court below (App. B, page ....) contains the remarks of Senator Kennedy and his analysis of S-505, noting Senator Kennedy's statement with respect to 402(b) that: "The Secretary, after a complaint is received on an election case, *must proceed into action within 60 days.*" And further, "The Secretary would be required to bring such action within 60 days after a complaint of violation has been filed with him." Cong. Rec. 887, Senate, Jan. 20, 1959, Legislative History of LMRDA of 1959, at page 766.

Moreover, Senator Goldwater noted that the Secretary "must, within 60 days after a complaint has been filed, bring a civil suit in a federal district court to set aside the invalid election, if any" (Appendix B, page .....).

Thus, plainly, the legislative history of Section 402(b) is wholly compatible with the mandatory language employed in the statute and is consonant with the concern of the Congress that union elections not be left in the limbo category, requiring in plain terms that the Secretary, upon a finding of probable cause of a violation, institute suit within 60 days. Such legislative history is entitled to substantial weight for it rests upon the statement of sponsors of the bill such as Senator Kennedy.

"If the committeeman in charge has the duty of defending the bill, he has familiarized himself with the situation sought to be remedied by the bill, and his statements may be taken as the opinion of the committee as to what is meant by the bill. Courts have taken a realistic view of legislative procedure and have excepted from the general rule excluding the use of statements in debate of individual legislators as to the meaning of the bill the statements of the member of the committee in charge of the bill. His remarks upon presenting the bill and the answers made by him to questions asked by members will be considered by the courts in construing provisions of the bill subsequently enacted into law. These statements are in the nature of supplemental committee reports and are entitled to the same weight accorded formal committee reports." 2 *Sutherland Statutory Construction* §5012, p. 50304, 3 Ed., 1943. Senator Kennedy falls in this category since the instant legislation was originally introduced as the Kennedy-Ives bill.

Nor does the construction required by the literal language and legislative history of the bill do violence to the congressional purpose of affording labor organizations the initial opportunity to remedy asserted violations under the "general congressional policy of allowing unions great latitude in resolving their own internal controversies." *Calhoun* v. *Harvey*, 379 U.S. 134, 140; *Wirtz* v. *Local 153*, 389 U.S. 463, at 472. FOR THE OPPORTUNITY AFFORDED UNIONS TO REMEDY VIOLATIONS HAS ABSOLUTELY NO RELATION TO THE 60-DAY LIMITATION IMPOSED BY THE CONGRESS UPON THE SECRETARY'S RIGHT TO SUE. This opportunity is provided in Section 402(a)(1)—the Exhaustion of Remedies Section, as is perfectly clear.

As the Court put it in *Local 153*, supra: "Even when an election violates these standards, the stated commitment is to postpone governmental intervention until the union is afforded the opportunity to redress the violation. *This is the effect of the requirement that a complaining union member must first exhaust his internal union remedies before invoking the aid of the Secretary.*"

There is no suggestion in any holding that Congress intended to grant the Secretary a right to sue without limitation provided only that the Secretary was attempting to settle the matter without any law suit. For the union has before it under its own internal procedures—and did in this case—the complaints of the union members, and at that juncture has an opportunity to consider and act upon such complaints.

Under the instant statutory scheme, such exhaustion of remedies is required of the union member before resort to the Secretary.

What appeared to really concern the Court was the Department of Labor's practice of accepting waivers with the incontestable result that compliance with the 60-day time limit required the Department to give prompt and expeditious consideration to the merit of the union member's complaint. But that is exactly what Congress intended. But under the holding of the Court below, the Secretary and consenting union officials could interminably postpone the resolution of a contested union election.

CONCLUSION

It is respectfully requested that for the reasons hereinabove asserted that this petition for a writ of certiorari should be granted.

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NO. 20508

United States Court of Appeals

FOR THE SIXTH CIRCUIT

JAMES D. HODGSON, Secretary of Labor,
Plaintiff-Appellant,

v.

INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided and Filed March 9, 1971.

Before: TOM C. CLARK, Associate Justice,* EDWARDS and CELEBREZZE, Circuit Judges.

EDWARDS, Circuit Judge. In 1959 the United States Congress adopted legislative standards of fairness in relation to elections in labor organizations and provided for enforcement of those standards by the United States District Courts through complaints initiated by the Secretary of Labor. *See* Labor Management Reporting and Disclosure Act of 1959, *as amended,* 29 U.S.C. § 481 et seq. (Supp. V, 1969).

This is a case of first impression at the appellate court level concerning the appropriate interpretation of Section 402(b) of the Act, 29 U.S.C. § 482(b) (1964):

> "The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied,

* Associate Justice, Supreme Court United States, Retired, sitting by designation.

> he shall, within sixty days after the filing of such complaint, bring a ~~civil~~ action against the labor organization as an entity in the district court of the United States. . . ."

The sole question in this appeal is whether the 60-day limit in the statute is absolute or may be waivered by agreement between the Secretary of Labor and the union.

In this case complaints from three local unions of the Pressmen's union [1] were filed with the Secretary of Labor pertaining to a general election conducted by the International Union. The Secretary undertook investigation of the conduct of the election and initiated discussions for settlement of the complaints with the International Union officers. These proceedings occupied a considerable period of time and twice the general counsel for the union wrote the Secretary agreeing to extend the period of time for the Secretary's enforcement proceedings beyond the 60-day statutory limitation.

These conferences ultimately failed to resolve the complaints and approximately 120 days after the original complaint the Secretary brought suit to have the election set aside.

In keeping with its previous waivers, appellee union did not plead the limitation as a defense. But the District Judge before whom the action was brought entered an order dismissing the complaint sua sponte. He held that he was without jurisdiction to entertain the cause of action because of the limitation. He relied in part upon *The Harrisburg*, 119 U.S. 199 (1886), wherein the Supreme Court said:

> "The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore, to be treated as limitations of the right." *The Harrisburg, supra* at 214.

The District Judge also relied upon legislative history which indicated congressional concern for prompt action by the Secretary of Labor. In this same regard appellee union points out that the statutory language is mandatory and that the initial draft of the legislation originally contained a 30-day limitation, followed by the language "or as

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[1] International Printing Pressmen and Assistants' Union of North America, AFL-CIO.

soon thereafter as possible," and that in the final version, the 60-day limitation was substituted without any similar additional language.

Appellant Hodgson, on the other hand, argues that the District Court decision, if affirmed by this court, will upset a long-standing interpretation of the Act under which waivers have been routinely accepted and given effect, that a statute of limitations is an affirmative defense which cannot be the subject of sua sponte action by the court when it is not pled by the defendant, and that in any event, the 60-day limitation in the statute should not be regarded as jurisdictional, since the logic of *The Harrisburg* case has been largely eroded or overruled by subsequent cases, such as *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424 (1965); *Glus.* v. *Brooklyn Eastern Terminal,* 359 U.S. 231 (1959).

Appellant also points out that a number of courts have in effect refused to interpret the 60-day limitation as jurisdictional when the facts indicated that a defendant union had prevented the Secretary from acquiring the needed information to formulate a complaint. *Wirtz* v. *Great Lakes Dist. Local 47, International Organization of Masters, Mates and Pilots,* 240 F. Supp. 859 (N.D. Ohio 1965); *Wirtz* v. *Local 705, Hotel and Restaurant Employees Union,* 63 L.R.R.M. 2315 (E.D. Mich. 1966), *vacated on other grounds* (unreported opinion), *order to vacate rev'd,* 389 F.2d 717 (6th Cir.), *cert. denied,* 393 U.S. 832 (1968); *Wirtz* v. *Independent Workers Union* 65, L.R.R.M. 2104 (M.D. Fla. 1967); *Wirtz* v. *Local 1622, United Brotherhood of Carpenters,* 285 F. Supp. 455 (N.D. Cal. 1968).

We have stated the arguments of appellee and appellant in detail because we believe them to be in close balance and difficult to weigh. Our final analysis of the problem is that appellee union's voluntary waivers which were relied upon by appellant may be pled by appellant Secretary of Labor as an equitable defense to estop the otherwise mandatory bar of the statute. The reasoning by which we reach this result takes a little longer to state.

We start with the sentence above, which we have quoted from *The Harrisburg:*

> "The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." *The Harrisburg,* 119 U.S. 199, 214 (1886).

Of course, if this represented the final treatment of this issue in a situation where, as here, the statute did create the action and also stated a time limitation, we would have nothing more to do than affirm the carefully reasoned opinions of the District Judge who dismissed this complaint.

In two important cases, however, the Supreme Court has stated a different standard for ultimate determination as to whether or not the time limitation would be given automatic and inflexible effect. *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424 (1965); *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959).

In one of these cases, in discussing *The Harrisburg*,[2] the Supreme Court noted that *The Harrisburg* court had not ruled out equitable defenses, but on the contrary, had simply held that none were presented therein:

> "No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown." *The Harrisburg*, 119 U.S. 199, 214 (1886).

And in both *Burnett* and *Glus* the Court held that the statute therein concerned could be tolled by an appropriate equitable defense when that defense accorded with the legislative purpose involved.

In *Glus* the Court said:

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations. In *Schroeder* v. *Young*, 161 U.S. 334, this Court allowed a debtor to redeem property sold to satisfy a judgment, after the statutory time for redemption had expired although the statute granting the right to redeem also limited that right as to time. The Court held that the purchasers could not rely on the limitation because one of them had told the debtor 'that he would not be pushed, that the statutory time to redeem

[2] Since this case was heard in the District Court, *The Harrisburg* has been squarely overruled, but on a legal issue other than that which concerns us here. *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970).

would not be insisted upon, and [the debtor] believed and relied upon such assurance.' The Court pointed out that in 'such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security.' 161 U.S., at 344." *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231, 232-33 (1959). (Footnotes omitted.)

In *Burnett* the Court said:

"The basic question to be answered in determining whether under a given set of facts. a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.' *Midstate Horticultural Co.* v. *Pennsylvania R. Co.,* 320 U.S. 356, 360. Classification of such a provision as 'substantive' rather than 'procedural' does not determine whether or under what circumstances the limitation period may be extended. As this Court has expressly held, the FELA limitation period is not totally inflexible, but under appropriate circumstances, it may be extended beyond three years. *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231. See *Osbourne* v. *United States,* 164 F.2d 767 (C.A. 2d Cir.); *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F.2d 253 (C.A. 4th Cir.); *Frabutt* v. *New York C. & St. L. R. Co.,* 84 F.Supp. 460 (D.C. W.D. Pa.). These authorities indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.

"In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Burnett* v. *New York Central R.R. Co.,* 380 U.S. 424, 427 (1965). (Emphasis added.) (Footnotes omitted.)

One important Supreme Court case of fairly recent origin has held that voluntarily executed waivers did not toll the statute of limitations dealt with therein. *Midstate Horticultural Co., Inc.* v. *Pennsylvania Ry. Co.,* 320 U.S. 356 (1943). However, as the Supreme Court noted in the *Burnett* quotation above, this decision was based entirely upon the

Court's interpretation of the legislative intent which underlay the statutory limitation there involved.

This then takes us to the difficult problem of seeking to ascertain legislative intent in the context of the facts of this case in Congress' enactment of the "within 60-day" time limitation.

In our consideration of the legislative history of this statute, we start with those relatively few sentences which have been preserved wherein the time limitation upon the Secretary of Labor's filing an election complaint was discussed. Of some significance, no doubt, is the fact that the original version of the proposed legislation in 1958 contained a 30-day period within which the Secretary of Labor would have to file a complaint. Subsequent thereto Senator Smith proposed first that the 30-day limitation be amended by adding the words "or as soon thereafter as possible," and subsequently that the phrase be added "but in no event after 60 days." Senator John F. Kennedy accepted these proposals, the Senate adopted a bill containing them, but the House failed to pass the bill.

The following year when Senator Kennedy introduced his bill, the language had been changed to the present statutory form "within 60 days." The record contains no explanation of the change.

Only two things seem clear to us from this review of what was and was not said pertaining to the time limitation. The first is the fact that obviously Congress was concerned that the Secretary of Labor moved promptly to investigate election complaints and where probable cause was found, to file legal action in the Federal District Courts. The second is that the record is completely devoid of any indication that Congress ever considered when, if at all, the 60-day limitation would be subject to being tolled by equitable defenses. It may, however, be significant that the more emphatic language "but in no event after 60 days" was not adopted.

We turn then to note the general purposes of this legislation, as found on the face of the statute and in the legislative history. The legislation patently sprang from congressional concern for protecting the right of the union members to democratic procedures within their labor organizations. The Congress found that under some circumstances protection of these rights required the intervention of the Secretary of Labor and fact-finding and equitable relief by the Federal District Courts.

There were, however, repeated expressions of a countervailing desire to allow unions to put their own houses in order whenever they could and would do so. In discussing the bill, its principal sponsor, Senator Kennedy said, "The important thing is to get the democratic procedure and then to let the union run its own internal affairs in keeping with that democratic procedure, with the policing surveillance which the Kennedy bill, with respect to this matter and other matters, gave to the Secretary of Labor."

A careful review of the legislative history leaves us unable to find any specific consideration by Congress of waiver of the 60-day time limit—the procedure here defended by the Secretary of Labor as being in the interest of quicker and less abrasive settlements of election disputes. It is clear, however, that from the effective date of the Act, July 1, 1962, down to date, the administrative interpretation of the time limitation has included heavy reliance upon negotiation with the union which was the subject of an election complaint and the subsequent voluntary compliance by the union with corrective measures suggested by the Secretary of Labor to insure the democratic election procedures which this statute was designed to protect.

An affidavit filed by the Secretary, the truth of which is not disputed, states that between July 1, 1962, and June 30, 1969, the Secretary conducted 329 Title IV investigations where in actionable violations were disclosed and that 53% of these disputes were resolved without litigation. It appears that waivers have been routinely tendered by the unions concerned and relied upon by the Secretary in two situations: 1) where the investigation was not complete and the union hoped to avoid the stigma of an official complaint, and 2) where the union was prepared to agree to a remedy but the action required could not be performed within 60 days. It is, of course, obvious that automatic application of the time limitation in these instances would run directly contrary to the expressed desires of Congress for unions to be given opportunity to perfect their own election procedures.

While not conclusive, considerable weight must, of course, be given to the administrative construction of a statute—particularly where, as here, it was contemporaneously applied without subsequent congressional criticism or amendment. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534, 549 (1940).

In the *Udall* case the Supreme Court said:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."' *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408." *Udall* v. *Tallman*, *supra* at 16.

Although there are no appellate court decisions directly in point on the question of automatic extinguishment of the Secretary's right to bring this type of complaint after 60 days, there are a number of District Court cases which have dealt with the problem. Aside from the District Court's decision in the instant case, all except one have supported appellant Secretary of Labor's contentions. *Schultz* [*sic*] v. *Local 1470, Int'l Brotherhood of Electrical Workers*, (D. N.J. Civ. No. 44-69, April 28, 1969); *Wirtz* v. *National Maritime Union*, 284 F. Supp. 47, 57 (S.D. N.Y. 1968), *aff'd*, 399 F.2d 544 (2d Cir. 1968); *Wirtz* v. *Local 545, Int'l Union of Operating Engineers*, 64 L.R.R.M. 2449, 2456 (N.D. N.Y. 1966), *aff'd*, 381 F.2d 448 (2d Cir. 1967). *See also Wirtz* v *Independent Petroleum Workers*, 307 F.Supp. 462, 465 (N.D. Ind. 1969); *Shultz* v. *Local 1299, United Steelworkers*, 73 L.R.R.M. 2673, 2674 (E.D. Mich. 1970); *Shultz* v. *Local 6799, United Steelworkers*, 71 L.R.R.M. 2820 (C.D. Cal. 1969); *Wirtz* v. *Local 1377, Int'l Brotherhood of Electrical Workers*, 63 L.R.R.M. 2029 (N.D. Ohio 1966); *Wirtz* v. *Local 57, Int'l Union of Operative Engineers*, 293 F.Supp. 89 (D.R.I. 1968); *Wirtz* v. *H. H. Guy Lodge, No. 872, Brotherhood of Railroad Trainmen*, 279 F. Supp. 873 (W.D. Pa. 1967). *Contra, Shultz* v. *Local 851, Int'l Machinists and Aerospace Workers*, — F. Supp. — (No. 70 C 1579, Oct. 29, 1970).

It is true that in these cases, for the most part, the judges concerned simply assumed the existence of jurisdiction. But

it is of some possible significance that no judge or litigant had ever seen fit to object to the waiver procedure until this case was dismissed in the District Court.

Although it really concerns a construction of federal rules, a Fourth Circuit decision in *Wirtz* v. *Penninsula Shipbuilders Ass'n,* 382 F.2d 237 (4th Cir. 1967), has some arguable bearing upon our problem. Basically the case held that where the 60th day available to the Secretary fell on Sunday, under a federal rule (FED. R. CIV. P. 6 (a)) filing on the 61st day, a Monday, was in compliance with the statute. While this suggests that the application of the time bar should not be quite as automatic as the appellee argues herein, Judge Sobeloff's reasoning is perhaps even more relevant:

> "In fact, section 402(b) is not even couched in the usual language of a statute of repose; rather, it is a directive to the Secretary which, under certain circumstances, he must follow." *Wirtz* v. *Penninsula Shipbuilders Ass'n,* 382 F.2d 237, 240 (4th Cir. 1967).

Finally, we turn to the other cases previously cited wherein tolling of the statute has been upheld because of conduct on the part of the union which impeded or delayed the Secretary's investigation. *Wirtz* v. *Great Lakes Dist. Local 47, International Organization of Masters, Mates and Pilots,* 240 F.Supp. 859 (N.D. Ohio 1965); *Wirtz* v. *Local 705, Hotel and Restaurant Employees Union,* 63 L.R.R.M. 2315 (E.D. Mich. 1966), *vacated on other grounds,* (unreported opinion), *order to vacate rev'd,* 389 F.2d (6th Cir.), *cert. denied,* 393 U.S. 832 (1968); *Wirtz* v. *Independent Workers Union,* 65 L.R.R.M. 2104 (M.D. Fla. 1967); *Wirtz* v. *Local 1622, United Brotherhood of Carpenters,* 285 F.Supp. 455 (N.D. Cal. 1968).

As to these cases the District Judge conceded that tolling of the statute was appropriate. We find ourselves in full agreement with this conclusion. To allow delay or deliberate concealment of election records to make it impossible for the Secretary to resolve a complaint to the point of finding (or not finding) probable cause, would offer a tempting method of defeating the basic purpose of Title IV. If, however, such an equitable consideration can toll the time limit with which we are here concerned, we find no logic which excludes giving similar tolling effect to the equitable defense of waiver.

It is, we believe, a mistake to discuss the question of tolling a statute of limitations in terms of whether jurisdiction exsts after a time limitation has passed. Where a statute (as here) gives jurisdiction to the United States District Courts over a certain type of complaint and sets a time limit for filing, the tolling of that time limit automatically extends the jurisdiction of the court. The basic question is whether in view of the congressional purpose any equitable considerations should be allowed to toll the limitation. For the reasons previously detailed, we believe that the congressional intent and purpose in enactment of Title IV is best served by holding that the waiver of the 60-day time limit and the reliance thereon tolled the time limitation and acted to estop its assertion by appellee. *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424 (1965); *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959); *See also* Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935).

We believe this view accords with modern intepretations of statutes of limitations. Perhaps even more important, we believe this view accords with the intent of Congress, since the 60-day time limitation which was waived by appellee was principally intended by Congress as a protection for the very party which executed the waivers.

The District Court had and has jurisdiction to hear and decide this complaint.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

APPENDIX "B"

IN THE

United States District Court

FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

GEORGE P. SHULTZ, Secretary of Labor, United States Department of Labor,

Plaintiff

v.

INTERNATIONAL PRINTING PRESSMEN and ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

Defendant

Civil action no. 2288

MEMORANDUM OPINION AND ORDER

This is an action under the Labor-Management Reporting and Disclosure Act of 1959, Title IV, 29 U.S.C. §§ 401, et seq., by the Secretary of Labor to set aside a purportedly invalid election of officers of the defendant international union and for a new election to be conducted under the aegis of such Secretary. 29 U.S.C. § 482 (b). The Court ruled preliminarily on December 3, 1969 that this action would stand dismissed, unless, no later than December 20, 1969, the plaintiff showed sufficient cause why it should not be dismissed for want of jurisdiction of the subject matter. The Secretary was accorded a hearing on his response to the show-cause order on April 13, 1970. Local Rule 12 (c).

The Court experienced difficulty in bringing this action into status for disposition. It was assigned unsuccessfully for pretrial conference several times. On representations of respective counsel that enlargements of time were necessary to allow full utilization of pretrial discovery techniques, many such enlargements were granted both parties. On August 18, 1969, the Court noted that it had been

"* * * somewhat lenient with both parties hereto because of the complexity of the issues involved. However, insistence will follow that this action proceed with all deliberate speed. * * * " In the process of reviewing the state of the record for purposes of judicial administration in November, 1969, the Court became aware for the first time that it lacked jurisdiction of the subject matter and proceeded *sua sponte* to enter its order of December 3, 1969, *supra.*

In his effort to show cause why this action should not stand dismissed, the Secretary does not question the Court's conclusions that: (a) where the time in which an action may be brought is established by the statute giving the right of action, the commencement of such action within such time of limitation is a condition precedent to bringing the action; (b) that a court's lack of jurisdiction of the subject matter of an action cannot be waived by the consent or other action of the parties litigant; (c) that, where there is want of jurisdiction of the subject matter of litigation, a court should decline *sua sponte* to proceed, even where the parties litigant make no contention concerning lack of jurisdiction; and (d) that a court must dismiss an action whenever it appears that it lacks jurisdiction of the subject matter of the litigation. Rather, the Secretary argues: (1) that, in some 14 prior decisions, courts have permitted the Secretary of Labor to proceed, even where a similar action was not commenced within the statutory period; and, (2) that, irrespective of all else, the Secretary should be permitted by the courts to extend the period of limitation established in the statute.

(1) As to the first of the former propositions, in one case cited by the plaintiff the district judge concluded that the only issue presented involving this question " * * * should not be ruled upon at this time. * * * " *Wirtz* v. *Independent Petroleum Workers of America, Inc., Local 1, Independent Oil Workers Union*, D. C. Ind. (1969), unreported. In another, it appears the action was commenced on the 60th day, and the district judge observed, by way of dictum, that, if the action had been filed " * * * the next day or any date after that time the Secretary would have been confronted with the defense that the suit was not timely filed. * * * " *Wirtz* v. *Local 36, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, D. C. Mich. (1966), unreported. This Court finds no reference whatever to this issue in three of the cases thus

cited, *viz.*: *Wirtz* v. *Local 1377, IBEW*, D. C. Ohio (1966), 63 LRRM 2029; *Wirtz* v. *H. H. Lodge, No. 872, Bro. of Railroad Trainmen*, D. C. Pa. (1967), 279 F. Supp. 873; *Wirtz* v. *Local Union No. 57, 57-A, 57-B & 57-C, Int. U. of Op. Eng.*, D. C. R. I. (1968), 293 F. Supp. 89. In five other such judicial decisions, it was held that the limitation in the statute was tolled because of the failure of the labor union involved to produce seasonably records or requested information to the Secretary. *Wirtz* v. *Local 705, Hotel Employees*, D. C. Mich. (1966), 63 LRRM 2315, 2317; *Wirtz* v. *Great Lakes Dist. Local No. 47*, D. C. Ohio (1965), 240 F. Supp. 859, 862 [5]; *Wirtz* v. *Independent Workers Union*, D. C. Fla. (1967), 65 LRRM 2104; *Wirtz* v. *Local Union No. 1622, Etc.*, D. C. Cal. (1968), 285 F. Supp. 455; *Wirtz* v. *Local 560, International Brotherhood of Teamsters, Etc.*, D. C. N. J. (1965), unreported.

It is true that there are four opinions in which the Secretary of Labor was permitted to commence an action such as this after the expiration of the 60-day limitation of 42 U. S. C. § 482(b). In one of these, the trial judge was concerned, not with presence or absence of jurisdiction, but with the issue of the authority of a union representative to make a waiver on behalf of a union. *Schultz* [*sic*] v. *Local Union No. 1470 of the International Brotherhood of Electrical Workers*, D. C. N. J. (1969), unreported. In three, there was a specific finding of fact by the trial judge that the union had waived the 60-day jurisdictional requirement. *Shultz* v. *Local 6799, Steelworkers*, D. C. Cal. (1969), 71 LRRM 2820, 2826; *Local Unions Nos. 545, 545-A, 545-B & 545-C Int. U. of Op. Eng.* v. *Wirtz*, D. C. N. Y. (1967), 64 LRRM 2449, 2456, affirmed C. A. 2d (1967), 381 F. (2d) 448; *Wirtz* v. *National Maritime Union of America*, D. C. N. Y. (1968), 284 F. Supp. 47, 57, affirmed C. A. 2d (1968), 399 F. (2d) 544. Significantly, the presence or absence of jurisdiction went unmentioned by all three of these district judges and by the Court of Appeals for the Second Circuit in the latter two opinions.

Thus, obviously, in none of the fourteen authorities relied upon by the plaintiff was there a judicial determination, except *sub silento*, contrary to this Court's earlier adjudication. And, regardless of the judicial permissiveness in these instances, the law is crystal clear that a court's jurisdiction of the subject matter of the litigation is a question "* * * which may be raised at any time * * *." *McGrath* v. *Kristensen* (1950), 340 U. S. 162, 167, 71 S. Ct. 224, 95 L. Ed.

173, 180 (headnote 1), citing *King Iron Bridge Co.* v. *County of Otoe* (1887), 120 U. S. 225, 226, 7 S. Ct. 552, 30 L. Ed. 623, 624; *United States* v. *Corrick* (1936), 298 U. S. 435, 440, 56 S. Ct. 829, 80 L. Ed. 1263, 1267.

Too, the legislative history of the Act under consideration seems to demand the result reached by this Court. " * * * Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived. * * * " *United States* v. *Fischer* (1804), 2 Cranch. 358, 386, 2 L. Ed. 304, 313.

In both the early Senate and House versions of this legislation, a limitation was written into the proposed law which created a new right of action. The House version accorded this new right to a member of a labor organization, who had exhausted the reasonable remedies available to him or had diligently pursued such available remedies without receiving a final decision within six calendar months. 2 U. S. Code Congressional and Administrative News 2459, Legislative History-House Report, Labor Management Act of 1959, 86th Congress, first session, 1959. The Senate version, according to its report, gave the right of action to the Secretary of Labor on the complaint of a union member. If the member was denied relief by the union or could obtain no definitive decision from the union within three months, he could then complaint to the Secretary. " * * * Since *time is of the essence* [emphasis supplied], no complaint may be entertained which is filed more than 1 month after the union has denied a remedy or the 3-month period has expired. * * * " U.S. Code Congressional and Administrative News 2337-2338, Legislative History-Senate Report, Labor-Management Act of 1959, 86th Congress, first session, 1959.

In its own publication, the Department of Labor's analysis of Title IV of the Act recognizes the limitation, *viz.*: " * * * *Section 402 (b)* * * * provides * * * [t]he Secretary is given 60 days after a complaint of violation has been filed with him *within which* to bring * * * an action * * * [to enforce the election provisions of title IV * * *, if, after investigation, he finds probable cause to believe title IV has been violated]. * * * " Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI, 698.

When S.3974, sponsored by the late Senators (John F.) Kennedy and Ives, was being discussed in the Senate, the late Senator Smith (of New Jersey) offered an amendment

to add a comma after the words, " * * * but in no event after 60 days * * *." Senator Kennedy then stated:

> MR. KENNEDY. Mr. President, it is my understanding that *the Secretary, after a complaint is received* on an election case, *must proceed* into action *within 60 days.* [Emphasis supplied.] Is my understanding correct?
>
> MR. SMITH of New Jersey. That is correct.
>
> * * *

Cong. Rec. 11182, Senate, June 14, 1959; *ibid.*, at 711. Further, in Senator Kennedy's analysis of S.505 he stated:

> * * * Court actions to enforce the election provisions of title [IV] would be brought by the Secretary if, after investigation he finds probable cause to believe title [IV] has been violated. The *Secretary* would be *required to bring such action within 60 days after a complaint of violation has been filed with* him. * * * [Emphasis added.]

Cong. Rec. 887, Senate, Jan. 20, 1959, *ibid.*, at 766.

And, adding something of a bi-partisan flavor, in the analysis of Senator Goldwater is this language:

> * * * Section 402 (b) provides that *the Secretary* must investigate such complaint by a union member, and if he finds probable cause to believe that a violation of this title IV has occurred and has not been remedied, he *must within 60 days after a complaint has been filed, bring a civil suit in a Federal district court* to set aside the invalid election, if any * * *. [Emphass supplied]

(2) As to the Secretary's second contention, in determining whether, under a given set of facts, a statute of limitations is tolled, the basic question is whether it was the legislative intent to extend the right of enforcement beyond the prescribed time.

Burnett v. *New York Cent. R. Co.* (1965), 380 U. S. 424, 426, 85 S. Ct. 1050, 13 L. Ed. (2d) 941, 944-945 [3]. That the statute under consideration may be tolled, when those circumstances are that the labor organization, against which a complaint has been filed by the Secretary of Labor, prevents his acquiring the information needed to formulate a complaint in a district court, can hardly be brought into serious question. But, despite any long-standing practice with the United States Department of Labor to afford labor

organizations an opportunity to take remedial action voluntarily with respect to their elections, in which violations of the Labor-Management Reporting and Disclosure Act are alleged to have occurred, before the Secretary commences litigation in that connection, both the mandatory language of the Act and its legislative history reflect an intention of the Congress to confine the right of the Secretary to so proceed precisely to sixty days after a complaint of violation of Title IV of the Act has been filed with him.

The plaintiff Secretary of Labor has not shown sufficient cause, in the opinion of this Court, why this action should not be dismissed for want of its jurisdiction of the subject matter, and the complaint hereby is

DISMISSED.

ENTER:

(C. G. Neese)
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-229

INTERNATIONAL PRINTING PRESSMAN AND ASSISTANTS' UNION OF NORTH AMERICA, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. B) is unreported. The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1971. The petition for a writ of certiorari was filed on June 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 60-day time limit of Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 for the institution of suit against a union by the Secretary of Labor may be waived by agreement between the Secretary and the union.

STATUTE INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. 482, provides:

> (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

STATEMENT

The sole issue raised by the petition concerns the timeliness of a suit by the Secretary of Labor challenging the validity of an international union election under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481, *et seq.*

After an election for officers of the petitioner union was held in February 1968, certain union members, after duly exhausting internal union remedies, filed complaints with the Secretary pursuant to Section 402(a) of the Act, *supra*, concerning the conduct of the election. Under Section 402(b) of the Act, *supra*, the Secretary, if he "finds probable cause to believe that a violation of this subchapter has occurred and

has not been remedied," is empowered to bring an action against the union to set aside the election "within sixty days after the filing of such [a] complaint."

Upon receiving the union members' complaint, the Secretary undertook an investigation and attempted to negotiate a settlement with the union (Pet. App. 12). Because these proceedings took a considerable length of time, the union twice agreed to extend the time in which the Secretary might bring suit (Pet. App. 12), expressly waiving, through its general counsel, "any and all defenses relating to the timeliness of any act or action required to be taken by the Secretary of Labor under Section 402 of the LMRDA which it might otherwise have * * *" (Court of Appeals Appendix, pp. 5, 6).

The settlement discussions ultimately failed to resolve the dispute and the Secretary, relying upon the waiver, brought suit under the Act approximately 120 days after the filing of the complaints by the union members (Pet. App. 12), but before the extended time period agreed to by the union had expired. The union in its answer, in keeping with its agreement, did not plead the 60-day time limit specified by Section 402(b) as a defense (Pet. App. 12). The district court nevertheless dismissed the action, *sua sponte*, for want of jurisdiction over the subject matter on the ground that the Act's 60-day time limitation was "jurisdictional" and could not be waived by a union (Pet. App. B).

The court of appeals reversed the judgment of the district court, and remanded for consideration of the Secretary's complaint. The court noted that "[t]he

basic question is whether in view of the congressional purpose any equitable considerations should be allowed to toll the limitation" (Pet. App. 20). The court concluded that "the congressional intent and purpose in enactment of Title IV is best served by holding that the waiver of the 60-day time limit and the reliance thereon tolled the time limitation and acted to estop its assertion by appellee [petitioner]" (Pet. App. 20).

ARGUMENT

The union contends that even though it expressly waived the 60-day time limitation of Section 402(b) in order to permit settlement negotiations with the Secretary, the Secretary is nevertheless barred by the 60-day time limitation from bringing this suit. It is clear, however, that the court of appeals properly construed Section 402(b) to prevent such an inequitable result. Accordingly, review of that decision is unwarranted.

1. This Court has indicated that whether a statutory time limitation can be waived depends upon "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424, 427. See also *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231. The legislative history of the election provisions of Title IV shows that Congress was concerned about disruptions of union affairs and discontinuities in union authority that might result from the extended judicial review of

elections provided by the Act. See S. Rep. No. 187, 86th Cong., 1st Sess., p. 22. Accordingly, the 60-day time limit was inserted in Section 402(b) to promote the resolution of union electoral disputes in the shortest possible time in order to free the union and the successful candidates from the suspicion of electoral malfeasance as quickly as possible and to enable them to act effectively in behalf of the union membership. To minimize these disruptions, it was also provided that the results of a union election would be presumed valid until proved otherwise and that the newly-elected officers would assume their responsibilities immediately pending resolution of the dispute. See Section 402(a), *supra.*

While the 60-day rule was designed to end as expeditiously as possible uncertainties arising out of elections, it does not follow that the time limit cannot be waived. The time limit is intended to benefit the union and its officers in removing doubts about their authority and reputation. See *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 468, n.7. Hence they should themselves be able to determine when the need for expedition is outbalanced by the interest in a thorough investigation of the charges or in settlement negotiations—either of which may be time consuming and may delay institution of the suit beyond the 60-day period, even while perhaps offering hope of a quicker ultimate resolution of the dispute than could be achieved by litigation.

Congress has expressed a decided preference for the resolution of intra-union conflicts by all processes

short of litigation. Construing Section 402, this Court has noted that, even when an election violates the Act, "the stated commitment is to postpone governmental intervention until the union is afforded the opportunity to redress the violation." *Wirtz* v. *Local 153*, *supra*, 389 U.S. at 472. And where governmental intervention is necessary, the statute envisions attempts by the Secretary "to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon* v. *Harvey*, 379 U.S. 134, 140. In the light of this preference to avoid litigation, the court below correctly interpreted Section 402(b) as permitting waiver of the 60-day limitation when, as here, settlement negotiations are in progress.

Moreover, waivers are necessary in order to allow the Secretary to conduct thorough investigations of complaints by union members prior to bringing suit. Section 402(b) provides that the Secretary must find "probable cause to believe that a violation of this subchapter has occurred and has not been remedied" before he may begin suit. The legislative history indicates that, in imposing the probable cause requirement, Congress looked with disfavor upon routine institution of suits to challenge union election practices. See S. Rep. No. 187, *supra*, p. 21. Accordingly, it conferred "a broad investigative power" on the Secretary. *Wirtz* v. *Local 125, Laborers' Int'l Union*, 389 U.S. 477, 485. The Secretary "may not initiate an action until his own investigation confirms that a violation of § 401 probably infected the challenged election." *Wirtz* v. *Local 153*, *supra*, 389

U.S. at 472. In the case of an international union election, as is involved here, the required investigation may involve many locals and it may not be possible to complete it within 60 days. In such circumstances, the purpose of the Act in assuring that a suit brought by the Secretary have a valid factual basis is furthered by a waiver of the 60-day limitation period.[1]

2. In an uncontroverted affidavit filed in behalf of the Secretary in the district court, it was pointed out that both the Secretary *and* the unions have long treated the 60-day time limitation of Section 402(b) as waivable (Pet. App. 17; Court of Appeals Appendix, pp. 33-35).[2] Since investigations are often extensive, the Department of Labor makes it a practice to accept agreements to extend the 60-day period when a union indicates an intention either to take voluntary remedial action or to consider the matter further before deciding whether to take remedial action. In fact, as the affidavit indicates, waivers of the time provisions are agreed to in more than half of all such cases. We submit that this long-standing contemporaneous administrative construction of Sec-

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[1] Although petitioner cites much legislative history in contending that the 60-day time limitation must be applied, the court of appeals accurately stated that there is no indication "that Congress ever considered when, if at all, the 60-day limitation would be subject to being tolled by equitable defenses" (Pet. App. 16).

[2] Extensions of the time limitation were, for example, agreed to in *Hodgson* v. *Local 6799, United Steelworkers*, No. 655, O.T. 1970, decided June 14, 1971 (see App. 5 and our brief p. 4 in that case).

tion 402(b) is entirely reasonable and consonant with the Act's purposes, and was properly upheld by the court below. See *Udall* v. *Tallman*, 380 U.S. 1, 16; *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549.[3]

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[3] Petitioner argues that the decision below conflicts with *Wirtz* v. *Peninsula Shipbuilders Association*, 382 F. 2d 237 (C.A. 4). In that case, however, the Fourth Circuit indicated that Section 402(b) does not have the finality of an ordinary statute of limitations, but rather is merely "a directive to the Secretary which, *under certain circumstances*, he must follow." 382 F. 2d at 240 (emphasis added).

The decision of the district court, reversed by the court of appeals, is based on the theory of *The Harrisburg*, 119 U.S. 199, 214, that where the liability and remedy are created by the same statute, "the limitations of the remedy are * * * to be treated as limitations of the right." However, this Court has now rejected the conceptual dogma of *The Harrisburg*. *Burnett* v. *New York Central R.R. Co.*, *supra*; *Glus* v. *Brooklyn Eastern Terminal*, *supra*. The petition does not rely upon the doctrine of *The Harrisburg*.

Finally, even if Section 402(b) is construed as an ordinary statute of limitations, the limitation must be raised as an affirmative defense and thus cannot be the subject of *sua sponte* action by the district court. See Rule 8(c), Fed. R. Civ. P.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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AUGUST 1971.

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